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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

MONSANTO COMPANY,
Appellee.

On Appeal From The United States District Court
For The Eastern District Of Missouri

BRIEF AMICUS CURIAE

on behalf of

ABBOTT LABORATORIES, AMERICAN
CYANAMID COMPANY, AMERICAN HOECHST
CORPORATION, BASF WYANDOTTE
CORPORATION, CHEVRON CHEMICAL
COMPANY, CIBA-GEIGY CORPORATION,
DOW CHEMICAL U.S.A., E.I. DU PONT DE
NEMOURS & CO., ELANCO PRODUCTS
COMPANY, ICI AMERICAS INC., MOBAY
CHEMICAL CORPORATION,
RHONE-POULENC, INC., ROHM AND HAAS
COMPANY, UNION CARBIDE
AGRICULTURAL PRODUCTS COMPANY, INC.,
UNIROYAL, INC. AND ZOECON
CORPORATION

IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE AMICI CURIAE

This brief *amicus curiae* is filed on behalf of sixteen companies engaged in the discovery, research, development, testing and sale of pesticide chemicals. The *amici* and other manufacturers have spent billions of dollars on pesticide research and development.¹ The product of their R&D is reflected in proprietary and trade secret research data, many of which are submitted to the U.S. Environmental Protection Agency to support the registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1982). The *amici* have a vital interest in preventing their research data from being appropriated by the Government for the private use of their competitors in contravention of the Fifth Amendment to the Constitution.

The *amici* urge affirmance of the district court's holding that the challenged provisions of FIFRA, which authorize the unconsented use and disclosure of privately owned trade secret research data by the Government for the benefit of competitors, work an unconstitutional taking of property for private use without just compensation.²

STATEMENT OF THE CASE

(i) The Importance Of Research To The Pesticide Industry

The pesticide industry is a vital component of the agricultural economy.³ Due in large part to effective pesticides, Amer-

¹ In 1982, manufacturers reported spending \$527 million on pesticide research and development. 1982 Industry Profile Survey of the National Agricultural Chemicals Association ("NACA Survey") at 7. Since 1971, industry R&D expenditures have exceeded \$3 billion. See 1971-1982 NACA Surveys.

² The *amici* have obtained written consent from both parties to file this brief.

³ Economic Research Service, U.S. Dep't of Agriculture, Implications of Pesticide Regulations, Rpt. No. AGESS810730, at 2-4, 11-23 (1981).

ican farmers feed the nation and supply one fourth of the food needs of the world.⁴

The lifeblood of the pesticide industry is research and development. The several dozen principal manufacturers of pesticides support extensive research programs.⁵ Painstaking R&D is necessary to discover or synthesize the very few chemicals that possess the unique characteristics required of a successful pesticide: the ability to selectively control an unwanted target pest without adversely affecting humans and other living organisms in the environment. Because hundreds of thousands of compounds have been screened over the past years for pesticidal potential,⁶ and the "easy" ones already have been found, the development of a new pesticide today is an arduous undertaking. The difficulty of discovering a chemical that has these rare characteristics, that is economical to produce and use, and that meets society's demands for environmentally and toxicologically safe products, makes pesticide research increasingly risky, time-consuming and expensive.⁷

⁴ U.S. pesticide sales in 1982 were \$4.2 billion. Herbicides, used principally to control weeds in food crops, accounted for nearly 70 percent of this market, and insecticides 21 percent. See 1982 NACA Survey at 4. Herbicides used on the \$20+ billion corn crop, for example, have been shown to increase crop yields by 25 percent. Hawkins, *Economic Analysis of Herbicide Use in Various Crop Sequences*, 17 Ill. Agric. Econ. No. 1, at 8-13 (1977); U.S. Dep't of Agriculture, *Agricultural Outlook* 41 (Oct. 1983). Pesticides in general contribute billions of dollars to the country's \$140+ billion agricultural production. U.S. Dep't. of Agriculture, *Agricultural Outlook* 12 (Nov. 1983).

⁵ 1982 NACA Survey at 2.

⁶ Between 1974 and 1982, more than 600,000 compounds were screened by companies responding to industry surveys. See 1974-1982 NACA Surveys.

⁷ EPA's Office of Pesticide Programs characterized the pesticide industry as having

large R&D investments as a percent of sales revenue; significant risk in product development, with large expenditures on unsuc-

In 1982, 120,000 chemicals were tested for pesticidal activity, yet only thirteen new products were registered by EPA.⁸ Of those pesticides registered, only a fraction will achieve sufficient commercial success to recoup their R&D costs before the patent expires.⁹ To produce this handful of "winners," the industry spent over one-half billion dollars on R&D in 1982, employing nearly 6,000 research scientists and technicians.¹⁰ For the new products registered in 1982, it took an average of nine years after discovery to complete R&D and obtain the first full EPA registration (six years for conditional registration),¹¹ nullifying a major part of the patent life. The cost of this research program exceeded \$40 million for each new chemical registered.¹²

(ii) The Value Of Research Data

Proprietary and trade secret research data are an intrinsic part of industry's extensive pesticide R&D effort. They con-

cessful as well as successful products; extensive product screening and testing programs; considerable time lag from invention to commercialization of product; and competition among proprietary products of different companies.

Office of Pesticide Programs, Environmental Protection Agency, Evaluation of the Possible Impact of Pesticide Legislation on Research and Development Activities of Pesticide Manufacturers at 2 (Feb. 1975).

⁸ 1982 NACA Survey at 7.

⁹ See generally Goring, *The Costs of Commercializing Pesticides*, Pesticide Management and Insecticide Resistance 31-32 (1977); Gilbert, *The Increasing Riskiness of the Pesticide Business*, Farm Chemicals (Apr. 1978).

¹⁰ 1982 NACA Survey at 7, 19.

¹¹ *Id.* at 7.

¹² *Id.* See also Council for Agricultural Science and Technology, *Impact of Government Regulation on the Development of Chemical Pesticides for Agriculture and Forestry*, Rpt. No. 87 at 8, Table 4 (1981).

tain elaborate procedures and results of each manufacturer's voluminous research, and represent the collective corporate body of knowledge concerning each product. Without this essential information, the chemical has no value. These data enable the manufacturer to determine the conditions necessary for the effective and safe use of the chemical. Because they prove safety and effectiveness, the data are the key to the market. The immediate and primary use of the research data is to support federal, state, and international marketing approvals. But beyond their utility for registration purposes, the data are the essential building blocks for future innovations, and provide insights that are valuable for the development of improved or related products. The data also contain innovative and state-of-the-art scientific techniques developed during the research process.

Consequently, the research data are the essence of any pesticide and have enormous value.¹³ They are a critical element of interfirm competition.

The value of these research data—and the inadequacy of the existing pesticide law to protect them—has been recognized by the same congressional committees that drafted the 1978 FIFRA amendments now under challenge. In its 1982 report approving legislation to remedy the problems with the 1978 FIFRA amendments, the House Committee on Agriculture stated:

If a company's safety, health and environmental fate data on a given pesticide were obtained by another

¹³ Because so few of the pesticides tested become successful commercial products, the value of the research data for a "winner" typically exceeds by many times the direct cost of testing that one product. The value reflects not only the cost of the massive research program necessary to produce the winner, and the risks involved in the development and regulatory approval process, but also the commercial advantage of owning data to support the marketing of a proven safe and effective product. For a research intensive company, the occasional winner must pay for all of the many losers.

competing firm, *the competing firm would gain a number of advantages from the opportunity to study this information.* First, the company would gain a detailed appreciation of the toxicity and environmental properties of the compound. This knowledge, in turn, is useful in many ways. The toxicity of a compound is a key factor in establishing the regulatory status of the pesticide, and how extensive a list of crop uses the Agency might ultimately be able to approve for the pesticide.

A compound's toxicity and environmental properties also are suggestive of the properties that similar compounds are likely to exhibit. If a compound displays particularly attractive and perhaps unanticipated properties, the competing firm might well choose to engage or significantly expand product synthesis work within the same or closely associated families of chemistry.

In addition, *a chance to review another company's safety and health data on a pesticide may readily yield scientific leads of significant value to a competitor.* The ability to gain detailed knowledge of the chemical and analytic methods utilized in particular studies may be extremely useful to competitors especially if the studies lay out analytic methods readily applicable to conducting comparable research needed to ascertain the safety, efficacy, mode of action, or environmental fate of other compounds. Many pesticide manufacturers have developed such methodologies, creating substantial qualitative improvements in the ability of scientists to understand and monitor the activity and environmental fate of the pesticide in the environment. These innovations greatly benefit both the innovating company and the EPA in that a more precise and reliable scientific assessment of a pesticide's safety can be carried out through their application.

The value of these innovative chemical and analytic methodologies to competitors can be substantial since the same methods may be easily and quickly adapted and applied to other pesticides which competing firms may already have under development. The investment and time period needed to obtain subsequent pesticide

registrations may be shortened considerably, perhaps by a number of years.

H.R. Rep. No. 566, 97th Cong., 2d Sess. 42-43 (1982) (emphasis added).¹⁴

Additionally, the Senate Committee on Agriculture, Nutrition, and Forestry stated:

Another type of economic harm from uncontrolled data disclosure that could be experienced by individual pesticide manufacturers, or by the industry as a whole, results from the use of disclosed data to gain pesticide registrations in other nations. Foreign pesticide markets are growing more rapidly than the domestic market. The profit potential for a firm investing in the development of a given pesticide, especially a new compound for which tens of millions of dollars have already been invested in research and development work, is becoming increasingly dependent on successful penetration into global markets.

S. Rep. No. 551, 97th Cong., 2d Sess. 21 (1982) (emphasis added).

Because pesticide research data have such a high commercial value, historically they have been considered proprietary and trade secret information, and maintained in confidence, both by the manufacturers and by the government officials to whom they have been entrusted. *See, e.g., Monsanto Co. v. Acting Administrator, EPA*, J.S. App. 26a.¹⁵

¹⁴ H.R. 5203 was passed by the House of Representatives on August 11, 1982. A similar bill was reported by the Senate Committee on Agriculture, Nutrition, and Forestry on September 20, 1982, but did not reach the Senate floor for a vote before the expiration of the Ninety-seventh Congress.

¹⁵ *See also* 7 C.F.R. § 1.3(b)(1) (1949) (providing that reports and supporting data submitted to USDA by applicants are administratively confidential); 7 C.F.R. § 1.4(b)(15) (1972) (providing that "data concerning products and formulations provided by industry for research purposes or in connection with the Department's registration and other regulatory functions" are administratively confidential); 7 C.F.R. § 370.13(d) (1968) (providing that "scientific and technical

(iii) **The Effect Of The FIFRA "Use" and "Disclosure" Provisions**

The "use" and "disclosure" provisions of the 1978 FIFRA¹⁶ effect a government-compelled transfer of the property of an owner of research data to other private persons. The use provision forces the data owner to give to his competitors one of the most important and valuable uses of his property: the use of the data to obtain a U.S. pesticide registration. The disclosure provision compels the owner to grant the use of his data to the world at large, destroying their trade secrecy. In combination, the use and disclosure provisions force the owner to give all commercial uses of his proprietary data to competing concerns.

The effect of this statute is to transfer the value of the right to use the data from their owner to others. The statute both bestows immediate wealth upon competitors who contributed nothing to the creation of the data, and simultaneously renders them virtually worthless to the owner who did expend the labor, skill and money needed to produce them.

The data owner is entirely dependent on a few "winners" to repay the enormous R&D expenses for testing the thousands of chemicals necessary to achieve one success. As long as the owner maintains exclusive control over the right to use his data, he can attempt to price a successful product so that he can recover his R&D investments. But when imitators who con-

data on products" and "data in research studies" where disclosure would adversely affect the respondent are trade secrets and confidential); 32 Fed. Reg. 9318-19 (1967) (amending 10 C.F.R. § 5.74 and Appendix A(11) to provide that "data in support of petitions relating to pesticide chemicals" are trade secrets and confidential).

¹⁶ The "use" provision, section 3(c)(1)(D), authorizes EPA to consider and rely upon the originator's research data to support registrations for subsequent applicants for similar products. The "disclosure" provision, section 10(d) (coupled with section 3(c)(2)(A)), requires EPA to make research data "available for disclosure to the public."

tributed nothing to this research effort are permitted to use the data to register imitation products in competition with the owner, they can price their imitation products at levels that do not reflect the need to recoup any R&D expense. As a result, the risk that the owner can no longer recover his investment is greatly increased and his research data may no longer have any competitive value to him. As is the case whenever trade secret property is disclosed to and used by competitors of the owner, the loss of exclusivity of use destroys the proprietary value of the property to its creator.

The FIFRA use and disclosure provisions will have a chilling effect on innovation. By diminishing the prospect that a pioneering company will recover its research investment, the FIFRA provisions will discourage R&D. Firms will be reluctant to make the extraordinary commitments required for pesticide research if they know that an imitator will be able to reap the fruits of their labors.

SUMMARY OF ARGUMENT

Through their labors and investments in research and development, Monsanto and the *amici* have created valuable trade secret research data which are property interests within the ambit of the Fifth Amendment. By transferring the right to use and enjoy such trade secret data from their owners to competitors, and by mandating their publication, the 1978 FIFRA destroys the value of the data to the owners and transfers their value to other private parties. The statute has all the characteristics of laws that this Court has consistently held to be takings cognizable under the Fifth Amendment.

The Government seeks to avoid the consequences of the Fifth Amendment by arguing that data owners may constitutionally be required to surrender their Fifth Amendment rights in order to obtain pesticide registrations. It is settled, however, that the strictures of the Fifth Amendment may not be evaded in this manner. The Government cannot require persons to surrender their Fifth Amendment rights as a condition for obtaining a license to do business. If such requirements

were permissible, the Fifth Amendment would be meaningless, for the Government could compel citizens to surrender property rights in return for the privilege of receiving a social security card, driving on interstate highways, or engaging in any commercial activity within the penumbra of federal regulatory power. The Government could not directly expropriate data owners' property rights without paying just compensation; and what it cannot do directly, it cannot do indirectly by imposing a "condition on a privilege."

The Government also contends that the FIFRA provisions should be affirmed as "regulations" of data owners' rights, based upon a "balancing" of the harm to owners against perceived benefits to the public. The Government's argument is both unavailing and misplaced. It is unavailing because even when evaluated under the standards for regulations that impose use restrictions, FIFRA unquestionably works a taking of data owners' trade secret property.

It is misplaced because this is not, in fact, a case of regulation. FIFRA does not purport to regulate the *owners' use* of their trade secret property to prevent the infliction of a perceived harm to the public interest, or to promote the public welfare. To the contrary, here the Government is simply appropriating the right to use the owner's property in order to bestow that right upon other individuals for their commercial benefit. Such "appropriation" is the textbook example of a taking. Even if, as EPA contends, public policy favors the acquisition of these property rights, and the acquisition is otherwise within Congress' power, the Fifth Amendment requires that Congress proceed by way of eminent domain.

Finally, the taking effected by the FIFRA provisions violates the Fifth Amendment because it is an illegal "private taking" and because data owners are not provided just compensation. Because the taking is for the benefit of individual competitors, it is a "private taking" and illegal *per se* regardless of just compensation. But, in addition, data owners are precluded from recovering just compensation for the taking of their property. The language of FIFRA demonstrates that

Congress has withdrawn the Tucker Act as a means for owners to seek just compensation. The Tucker Act also is not available here because Congress has not appropriated funds for the taking and has indicated an intent that no federal monies be obligated for this purpose. Even if the Tucker Act were available, however, the Claims Court could not adjudicate taking claims because it is not an Article III court. Just compensation thus is not available to data owners for the taking of their property by FIFRA.

ARGUMENT

I. TRADE SECRET RESEARCH DATA ARE PROPERTY PROTECTED BY THE FIFTH AMENDMENT

In the district court, EPA stipulated that Monsanto's trade secret research data are property interests within the ambit of the Fifth Amendment protection against takings. J.S. App. 30a. This is so because the research data are items of commercial value created by the owner's labor and investments. Although state and federal laws clearly protect trade secret property rights, even in their absence these valuable research data would be encompassed by the Fifth Amendment's proscription against the taking of property without just compensation. "The label does not matter, the substance cannot be taken away by the United States even for public use without the owner being made whole." *United States v. Smoot Sand & Gravel Corp.*, 248 F.2d 822, 827-28 (4th Cir. 1957). The term "property" comprises

the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . In other words, it deals with what lawyers term the individual's "interest" in the thing in question. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

On appeal, EPA concedes that "while the data remained exclusively in Monsanto's hands any trade secrets contained in

the data would continue to enjoy whatever protections state law afforded." Appellant's Brief at 27. EPA now contends, however, that Monsanto's admitted property rights in its research data were extinguished when Monsanto submitted the data to the Government to obtain registrations. In EPA's words, Monsanto "chose to forego them in order to obtain registrations." Appellant's Brief at 30. In essence, EPA argues that a property owner may be required to surrender constitutionally protected property rights in return for a government license to engage in commerce.

EPA's suggestion that an applicant may be compelled to trade his Fifth Amendment rights for pesticide registrations is incorrect. The United States could not directly condemn and seize an owner's research data without paying just compensation; and what it cannot do directly, it cannot accomplish indirectly. It is settled that the "Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition of the permit." *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18, 20 (D.C. Cir. 1949). See also *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926).

In *Frost & Frost*, a state statute required that a private carrier agree to conditions imposed on public carriers in return for the privilege of using the state's highways. The Court had previously held that private carriers could not be compelled by legislative fiat to become public carriers; and in *Frost & Frost*, the Court held that what the legislature could not accomplish directly, it could not accomplish by imposing a "condition on a privilege." The state argued that the forced relinquishment of the private carrier's property as a condition precedent to the attainment of a privilege did not offend the Constitution because the private carrier voluntarily submitted itself to the statute's terms; the private carrier was not compelled to "apply" for the statute's coverage. If a private carrier chose to apply for a certificate, however, the state suggested that any conditions could be imposed as prerequisites for granting the privilege.

The Court disagreed, recognizing that the state's argument elevated form over substance. Although the statute spoke of voluntary submission to its terms, the Court recognized the statute as compulsory in every sense: the statute forced the private carrier to make "a choice between the rock and the whirlpool . . . [to] forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." 271 U.S. at 593.

The Court stated that although as a general proposition the state could impose such conditions as it saw fit upon a valuable privilege such as a license,

[t]he power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

271 U.S. at 593-94. See also *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 657-65 (1981); *Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 678-79 (1967) (Douglas, J., concurring); *Garrity v. New Jersey*, 385 U.S. 493, 497-500 (1967).

In the present case, FIFRA requires that applicants surrender Fifth Amendment rights as a condition precedent to receiving a pesticide registration. The issue for this Court is whether this public acquisition of private rights effects a taking. If, as is the case here, it would be a taking if accomplished directly, then it is no less a taking simply because it is accomplished as a "condition on a privilege."

EPA also argues that the doctrines of federal supremacy and preemption dictate that Monsanto's state law rights must yield to the extent that they "conflict" with FIFRA's provisions. Appellant's Brief at 27-28. EPA suggests that because Monsanto's property rights are entirely derived from state law, those rights are not "taken" but rather extinguished by

FIFRA. This fallacious argument would nullify the Fifth Amendment, for most if not all takings could be construed as "redefinitions" of property rights. There is no issue in this case of federal supremacy. FIFRA may supersede state laws, but it cannot supersede the Fifth Amendment. All otherwise valid Commerce Clause legislation is subject to the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979). If the public interest requires that property rights in research data be expropriated, Congress must accomplish this by eminent domain, in accordance with the Fifth Amendment. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935). See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 96 (2d Cir.) (Hand, J., concurring), cert. denied, 346 U.S. 877 (1953).

Equally flawed is EPA's argument that trade secret property is protected only against *unlawful* use and disclosure and that FIFRA makes such use and disclosure "lawful." Appellant's Brief at 28-29. Under this circuitous logic Congress could appropriate all private trade secrets at any time, without compensation, merely by providing that it is lawful to use or disclose them. Such a result is not consistent with the Fifth Amendment.

Finally, EPA attempts to characterize the property rights of data owners as merely a "unilateral expectation" of competitive gain based upon the "public acts of government." Appellant's Brief at 31-32. According to EPA, data owners have no cause to complain when the laws are changed to frustrate their unilateral expectations.

This argument mischaracterizes the nature of the property rights at issue. As discussed previously, EPA concedes the existence of property rights in research data while they are in the possession of the owner. These rights are derived from "investment-backed expectations" of the sort that this Court has held to merit Fifth Amendment protection. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127, 130, 138 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S.

393, 413 (1922). They are not gifts bestowed by "public acts of government" but rather the hard-earned fruits of labor and investments made within a legal framework that respects and preserves such rights. They do not vanish simply because one federal law seeks to change the terms of how the United States Government will deal with them.¹⁷

II. TRADE SECRET RESEARCH DATA ARE "TAKEN" WITHIN THE MEANING OF THE FIFTH AMENDMENT BY THE PROVISIONS OF FIFRA

Without stating the point in so many words, EPA contends that the taking question in this case should be judged according to the standards and tests for "regulation takings," i.e., cases in which property values are diminished by use restrictions imposed by police power or Commerce Clause legislation. This is the thrust of EPA's contention, because the "bundle of sticks" and "balancing" tests proffered by EPA are for application *only* to "regulation" takings, and all of the precedents cited by EPA are "regulation" cases. Appellant's Brief at 33-34.

In fact, the FIFRA provisions at issue here are not a "regulation" of the research data, but an outright expropriation of them. For this reason, EPA's arguments and citations on the taking issue are irrelevant.

¹⁷ EPA argues that Congress could rescind the FIFRA registration process altogether or prohibit the use of pesticides. Appellant's Brief at 31. Although this may be correct, neither act would necessarily be a taking. What Congress cannot do is transform *private* data into public property by legislative fiat and without just compensation. See *Frost & Frost*, 271 U.S. at 595-96 (state could totally prohibit a business, but could not condition its continuance upon surrender of constitutional rights).

A. The FIFRA Provisions Completely Destroy The Value Of The Trade Secret Data

The FIFRA provisions found unconstitutional by the district court permit the unconsented use of the owner's trade secret data to support competitors' registrations, and compel their disclosure. As the Court recognized in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974), the owner of a trade secret has only the right to exclude others from the enjoyment of the trade secret. The law affords the owner two protections of this right: protection against disclosure and protection against unauthorized use. See also *E. I. du Pont de Nemours & Co. v. United States*, 288 F.2d 904, 911 (Ct. Cl. 1961); R. Milgrim, *Trade Secrets* § 4.01 at 4-2, § 7.07[1] (1983). Just as Monsanto owns research data that consists of "trade secrets under the law of Missouri and consequently has the right to prevent their use and disclosure,"¹⁸ other companies' research data enjoy similar protections.

As the Court held in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979):

[T]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation.

Id. at 170-80 (footnote omitted).

The data owner's right to exclude is completely extinguished by these provisions of FIFRA and this valuable property is thus "taken" by the statutory provisions at issue. EPA's argument that there is no "physical invasion" of the trade secret property is misplaced. By disclosing the trade secret data and permitting competitors to use them for any commercial purpose, the data have been "invaded" as thoroughly as in any condemnation.

EPA proposes that "a taking is more readily established where the government regulation destroys all property

¹⁸ *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 3 (1983).

rights," yet fails to recognize what was apparent to the district court: the provisions of FIFRA do destroy the proprietary value of the owner's data. Contrary to the Government's argument, the public disclosure of the data and their unconsented use for the benefit of competitors take not merely strands in a larger bundle of proprietary rights but the essence of the bundle itself. Even under the line of authority relied on by EPA evaluating *regulations* under the takings clause, the FIFRA provisions must be considered a taking.

B. Because The FIFRA Provisions Expropriate Private Property, They Constitute A Taking

The "taking" issue in the present case is simpler than the issues presented by cases where true "regulations" diminish the value of private property. This is not a case of regulation, but of expropriation. FIFRA does not regulate an owner's use of his data; it forcibly takes the use of the data and gives it to competitors for their use and benefit. Congress has declared that what was formerly private property be made available to the public. But instead of condemnation and payment of just compensation, Congress elected simply to appropriate the property for others' use. This Congress cannot do.

EPA correctly notes that in taking cases, the "nature of the government action" must be considered as well as "the extent to which the government's action interferes with 'distinct investment-backed expectations.'" Appellant's Brief at 33. EPA apparently construes this dictum as calling for a balancing of the public purpose ostensibly to be served against the harm visited upon affected parties. EPA is confusing the "nature of the action" with the "motive for the action." The correct inquiry concerning the nature of the government's action is not "Why was it done?" but "*What* was done?" In this case, a focus on what was done discloses that FIFRA does not regulate trade secrets, but rather appropriates them and transfers their use and benefits from their owners to other private parties. Because in this respect FIFRA is an "appropriation," not a regulation, it is a taking *per se* and there is no "balancing"

to be done. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 433 (1982).¹⁹

The cases decided by this Court under the "taking" jurisprudence are consistent in application of the distinction between "appropriation" and "regulation." A regulation imposes restrictions on "an owner's use of his own property where deemed necessary to promote the public interest." *Loretto*, 458 U.S. at 426. By contrast, *an appropriation seizes some use of property for the benefit of members of the public*. Congress legitimately may prevent a person from using his property in a manner contrary to the public interest. It may not, without infringing rights protected by the Fifth Amendment, appropriate the benefit or use of the property for members of the public without paying for it.

The Court has discussed and applied this pivotal distinction in two recent "appropriation taking" cases. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court rejected the Government's "bundle of sticks" analysis, stressing that

[t]his is not a case in which the government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition [in this case] . . . will result in an actual physical invasion of the privately owned marina. . . . And even if the government physically invades only an easement in property, it must nonetheless pay just compensation.

Id. at 180 (citations omitted). In the present case, similarly, the Government is not *regulating* an owner's use of his research data, but is invading these privately owned data by making the use of them available to the public.

¹⁹ See also L. Tribe, *American Constitutional Law* § 9-3 at 460 (1978) (clearest example of a taking is where the government transfers the legal powers of enjoyment and exclusion that are typically associated with property rights); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

The Court employed the same approach in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The City of New York had granted the cable television company an easement to enter upon certain private buildings to install cable equipment. A New York City landlord challenged this action as a taking of a small part of her property, the part the cable company used to install permanent switching stations. The City attempted to defend the statute with the customary "balancing test" and "bundle of sticks" analyses. The Court brushed these arguments aside as simply irrelevant where the character of the government action was a permanent physical invasion of property—even a very small portion of a large property.²⁰ 458 U.S. at 426, 433-35. The same logic applies in the present case. By enabling competitors to obtain full use of the proprietary research data, FIFRA's action is analogous to the physical invasion of real property.²¹

²⁰ The Court quoted with approval Professor Michelman's statement that "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." *Loretto*, 458 U.S. at 427 n.5.

In the present case, EPA seeks to cause the public and competitor companies to "regularly use" trade secret data that previously were understood to be under private ownership.

²¹ See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby* . . . is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." . . . See also *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over

In the context of "regulation taking" cases, the Court has emphasized that the character of the governmental action partakes of a restriction on the owner's use. See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979). In upholding the regulations (restraints on sale) at issue in *Andrus*, the Court noted that their effect was to restrict the owner's use of property, not to acquire the property. *Id.* at 66-67. The Court concluded with a quote from Justice Brandeis:

[T]here was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

Id. at 67 (emphasis added) (quoting *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 303 (1920)). Accord *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 157 (1919) ("There was no appropriation of the liquor for public purposes."); *United States v. Cress*, 243 U.S. 316, 328 (1917) ("But it is the character of the invasion, not the amount of damage resulting from it . . . that determines the question whether it is a taking.").

Here, by contrast, the effect of the FIFRA amendments is precisely to appropriate the use and benefit of trade secret research data. The statute in effect has declared that what was previously private property now is public property that all may enjoy equally. This is an appropriation of private property, not a regulation of its use.

EPA makes only a half-hearted attempt to address the "appropriation" issue, stating that "there is also no appropriation of Monsanto's property by the government. The government does not market pesticides, it uses the data. . . . While other companies may obtain a registration on the basis of Monsanto's data [they receive no other rights in the data]." Appellant's

claimant's land is a taking); *United States v. Cress*, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a taking). . . .

438 U.S. at 128 (citations omitted).

Brief at 35. If anything, this statement supports Monsanto's position. EPA argues that there has been no governmental appropriation because the Government "does not market pesticides." Monsanto's competitors do market pesticides, however, and they are the principal beneficiaries of the Government's appropriation of the data.

The nature of the actions authorized by FIFRA makes it clear that the statute effects a taking.

III. THE TAKING EFFECTED BY FIFRA IS UNCONSTITUTIONAL AND WAS PROPERLY ENJOINED

The district court ruled that the taking imposed by FIFRA contravened the Fifth Amendment. The district court's holding was correct both because FIFRA works a private taking that is unconstitutional regardless of the availability of just compensation and because the Tucker Act is not available in this case to provide just compensation.

A. The Taking Of The Trade Secret Research Data Is For A Private Use

The taking of trade secret research data effected by FIFRA is for the direct benefit of other private parties.²² The unequivocal purpose and result of this section is to provide valuable research data owned by certain companies to their competitors who have not "contributed in money, services, negotiations, skill, forethought, or otherwise," *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 77 (1937). As in *Thompson*, there is "no more glaring instance of the taking of one man's property and giving it to another" than is found in the forced sharing of an owner's proprietary research data imposed by FIFRA for the benefit of private parties. *Id.* at 79.

²² The question of whether a taking is for a private or public use is one for judicial resolution as is the question of just compensation discussed hereinafter. See *Cincinnati v. Vester*, 281 U.S. 439 (1930).

The district court recognized that the "mandatory licensing" of data owners' property to others for their direct benefit cannot satisfy the requirement of a public use and cannot be sustained under the guise of a regulation of commerce. This is not a regulation of property, but rather a taking for the benefit of private parties. See *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1874). There the Court stated:

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Id. at 664. Just as the taxing power is limited by the Fifth Amendment, so too is the power of Congress to regulate commerce.²³

B. The Taking Is Without Just Compensation

EPA admits that FIFRA itself does not provide just compensation for any takings ("the intra-industry compensation scheme [in FIFRA § 3(c)(1)(D)(ii)] was not meant to provide Monsanto 'just compensation' within the meaning of the Fifth Amendment"). J.S. at 25; Appellant's Brief at 41.²⁴ As stated

²³ See *United States v. Cress*, 243 U.S. 316 (1917); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.

148 U.S. at 336.

²⁴ Because neither the Government nor Monsanto contends that FIFRA does provide, or was intended to provide, just compensation, the Court should not decide in this case whether the FIFRA compensation scheme violates Article III of the Constitution. See Appellant's Brief at 48-49. The question of whether the FIFRA data use and compensation provisions independently violate Article III was

by the Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), "the issue becomes whether the scheme of the Act, supplemented by the legislative history, sufficiently evidences a Congressional intention to withdraw a remedy that would otherwise exist." *Id.* at 126.

FIFRA clearly evidences the intent of Congress that the private compensation provisions of section 3(c)(1)(D) are to be the sole *quid pro quo* for the takings effected by the provisions held unconstitutional by the district court. Congress sought to limit any compensation to the data owner only to that provided in section 3(c)(1)(D). Substantive review of such statutory "compensation" determinations is expressly denied to every court of the United States. The statute demonstrates a plain intention to withdraw any otherwise available Tucker Act remedy and to make compensation self-contained in FIFRA itself.

C. Application Of The Tucker Act To Provide Just Compensation In This Case Would Violate Article I, Section 9, Clause 7 Of The Constitution

Resort to the Tucker Act to provide just compensation in this case would violate Article I, Section 9, Clause 7 of the Constitution. Congress has made no appropriation to pay for a taking of billions of dollars of trade secret research data, and has expressed an intent that the United States *not be* liable for such data. The Tucker Act therefore cannot supply just compensation for the taking.

Article I, Section 9, Clause 7 provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropria-

decided in *Union Carbide Agricultural Products Co. v. Ruckelshaus*, 571 F. Supp. 117 (S.D.N.Y. 1983). A direct appeal to this Court was noticed in that case on December 21, 1983. Inasmuch as this issue will be squarely before the Court in *Union Carbide*, and is not necessary to the decision in the present case, the Court should await a full record and thorough briefing on the Article III question and should not decide it here.

tions made by Law. . . ." Pursuant to this grant of constitutional authority, Congress has the exclusive "power of the purse." The federal courts have no power to compel the United States to pay just compensation for a taking. "The absolute control of the moneys of the United States is in Congress and Congress is responsible for its exercise of this great power only to the people." *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886). Where Congress has not appropriated funds for a particular purpose, neither the executive branch nor the judicial branch can compel payment of funds from the Federal Treasury. *See Reeside v. Walker*, 52 U.S. 272, 291 (1850) (No officer of the Federal Government is authorized to pay a debt due from the United States, whether or not reduced to a judgment, unless an appropriation has been made for that purpose). *Cf.* 28 U.S.C.A. § 2517(a) (West Supp. 1983). The Court has not hesitated to apply this principle even in cases in which it worked obvious injustice to creditors of the United States. *See, e.g., Sutton v. United States*, 256 U.S. 575 (1921); *Hooe v. United States*, 218 U.S. 322 (1910); *United States v. Doullut*, 213 F. 729 (5th Cir. 1914).

In cases where Congress has expressly or impliedly acknowledged an obligation to pay just compensation for actions which constitute a taking, the Court has construed the Tucker Act as a means for enforcing this obligation. *E.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). However, the Tucker Act has never been held by this Court to authorize the payment of just compensation where a congressional intent to obligate funds of the Treasury for such a taking could not be found. To extend the Tucker Act in such a fashion would violate Article I by abrogating Congress' authority and responsibility to control the obligation of the funds. Such a doctrine would permit the obligation of federal monies in the absence of an express or implied acknowledgement by

Congress that a taking may occur and that the United States will be liable to pay just compensation if it does occur.²⁵

Application of the Tucker Act to provide just compensation in this case would violate Article I because it would create an obligation upon the United States Treasury under circumstances where the Court cannot conclude that Congress was aware that FIFRA would effect a taking or that it would be willing to appropriate funds to pay the obligation if it were aware of the taking implications.²⁶ In fact, the language of

²⁵ The Tucker Act does not contain any express congressional agreement to obligate funds to pay just compensation for actions which constitute a taking. The Act itself merely creates a waiver of sovereign immunity for claims against the United States arising under the Constitution. The Court should not read into this simple waiver of sovereign immunity an intent by Congress to abdicate its Article I duty to control the obligation of funds for actions it did not perceive to be takings and for which it would not have obligated funds if it had been aware of the taking consequences.

²⁶ Moreover, Congress could refuse to appropriate funds to cover the obligation. Prior to 1977, Claims Court judgments in excess of \$100,000 could not be paid until they had been specifically approved by Congress. 31 U.S.C. § 724a (1976). Section 724a was amended in 1977 to remove the requirement for specific congressional approval, so that judgments in any amount now are paid automatically from the "judgment fund." If inadequate funds are present in the judgment fund, however, no judgments can be paid until more funds are appropriated for that purpose by Congress. Congress could refuse to appropriate more funds, or could direct that the additional funds not be spent for a particular purpose, e.g., FIFRA takings.

If Congress feels morally compelled to appropriate the funds once the taking has occurred and the debt has been created, even though Congress never contemplated that FIFRA would lead to a taking and might well have altered FIFRA to avoid such a result if it had been contemplated, then Congress' prerogatives under Article I will have been abridged.

Congress has many times expressed its ire at acts of government which cause such "moral obligations" to arise which Congress feels

FIFRA compels the conclusion that Congress did *not* intend to obligate federal funds for this purpose. The FIFRA compensation scheme provides that the sole recourse for the actions that constitute the taking shall consist of arbitration between private persons in which the Government is not a party.

In the cases in which the Court has permitted recourse to the Tucker Act to provide just compensation for threatened takings, Article I problems did not arise. In these cases, there was congressional awareness that the actions it was authorizing would lead either to taking liability or, at a minimum, to substantial obligations of funds from the Federal Treasury. See, e.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Congress provided a fund to pay just compensation to owners of railroad property); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (Congress provided that the United States would be liable in the event of a nuclear plant failure); *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Congress provided funds for flood-control project construction which resulted in diminution of the value of land). *In each of these cases, Congress demonstrated an intent to obligate federal funds for the programs which gave rise to alleged takings.* Under these circumstances, the Court did not authorize obligations by permitting recourse to the Tucker Act; Congress had already authorized the obligations when it mandated the acts in question with awareness of their federal fiscal implications.²⁷

that it must pay although constitutionally it cannot be compelled to do so. The avoidance of such "moral obligations," which abridge Congress' Article I powers, has been a major objective of Congress, leading to the passage and repeated strengthening of the Anti-Deficiency Act, 31 U.S.C. § 665 (1976 & Supp. V 1981). For a discussion of the background of the Act, see Fenster & Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L.J. 155, 156-62 (1979).

²⁷ Further, most of the "Tucker Act cases" relied upon by the Government were either cases where the taking had already occurred, so there was no question of injunction, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Yearsley v. W.A. Ross Constr. Co.*, 309

In the case of FIFRA, Congress did not intend to obligate any federal funds to pay for the use or disclosure takings effected by the statute. To the contrary, Congress intended that only private concerns be involved in compensation adjudications, and it withdrew the jurisdiction of federal courts over compensation awards. Where, as in the present case, there is an imminent and substantial taking, with no evidence of congressional intent to obligate the United States for acts that might result in a taking, to proceed based on the availability of the Tucker Act would violate Article I by creating an unintended and unauthorized liability.

Other cases decided by the Court are consistent in result with the Article I requirement that Congress must make the decision to obligate funds. In such cases, the Court has struck down congressional legislation and instructed Congress to consider the implications of its actions, and if it chooses to proceed, to do so by eminent domain. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935). See also *Perry v. United States*, 294 U.S. 330 (1935); *Lynch v. United States*, 292 U.S. 571 (1934).

U.S. 18 (1940), or cases in which there was no imminent taking but only the speculative possibility of a taking at some undetermined future date if certain contingencies arose, *e.g.*, *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

In the former group of cases, the "taking" had already occurred and the federal financial obligation thereby incurred, so there was no Article I issue raised by the Court's recognizing the existence of the federal obligation. In the latter group of cases, (1) there was no certainty of a taking with its concomitant federal obligations, so the Court did not create obligations when it refused to strike down the acts; (2) the fact that the taking, if any, was in the future meant that Congress would have an opportunity in the meantime to change the legislation to avoid the taking, so preserving its Article I prerogatives, see *Rail Act Cases*, 419 U.S. at 149 n.36, 179-80 (Douglas, J., dissenting); and (3) Congress had in each case provided for substantial federal obligations, thus evincing its intention to exercise its Article I powers.

In *Louisville Bank*, as here, the nature of the congressional action was a sweeping reallocation of intangible property rights (relating to liens and foreclosures) from their owners (banks) to other persons (primarily small farmers). In that case too, Congress believed it could accomplish its goal by redistributing private rights without paying for them. The Court held the offending provisions void, and Congress was thereby given the opportunity to consider whether it wished to pursue its objective of mortgage relief by using its eminent domain power, whether it could accomplish its goal in some other, less expensive manner, or whether it would prefer to abandon its goal. The same result would follow in this case from an affirmance of the district court's judgment.

D. The Claims Court Does Not Have Constitutional Power To Adjudicate Taking Claims, And There Is No Appropriate Forum For Data Originators To Invoke A Tucker Act Remedy

Prior to enactment of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, constitutional taking claims were adjudicated in the United States Court of Claims. The Court of Claims was constituted under Article III of the Constitution, *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), and its judges were accorded the life tenure and guarantee against diminution in salary afforded by Article III.

Under the Federal Courts Improvement Act, however, the adjudication of taking claims is vested in the newly created United States Claims Court. Congress constituted the Claims Court as a legislative court under Article I of the Constitution, its judges serving fifteen-year terms, subject to reappointment by the President. 28 U.S.C.A. §§ 171(a), 172(a) (West Supp. 1983). Thus adjudication of taking claims, traditionally entrusted to an Article III judicial forum, is now within the jurisdiction of a non-Article III court.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), a plurality of the Court held that the Bankruptcy Reform Act of 1978, which created a system of

bankruptcy courts as adjuncts to federal district courts, violated the constitutional requirement that judicial power must be exercised by courts having the attributes prescribed in Article III. The Court found unconstitutional the delegation by Congress of powers traditionally held by federal district court judges, to non-Article III bankruptcy court judges. The Court declared that, except in certain limited circumstances, the judicial power of the United States is constitutionally entrusted to, and must be exercised by, judges who have the attributes guaranteed by Article III.²⁸ *Northern Pipeline* was premised in part on the prior decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in which the Court held that cases involving enforcement of constitutional rights must be heard by Article III tribunals:

We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

285 U.S. at 64. The Court emphasized the need for an Article III determination in "confiscation" cases in particular:

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v. Ben Avon Borough*, *supra*. See, also, *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 50; *Tagg Bros. & Moorhead v. United States*, *supra*; *Phillips v. Commissioner*, 283 U.S. 589, 600.

285 U.S. at 60.

²⁸ See also *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983), *reh'g granted*, Nos. 82-3152, 82-3182 (9th Cir. Oct. 20, 1983).

The Claims Court suffers from the same constitutional defect that was found fatal in *Northern Pipeline* and *Crowell*. To the extent that the Claims Court is vested with exclusive jurisdiction over taking cases, it intrudes upon the constitutional jurisdiction of Article III courts. *Northern Pipeline* and *Crowell* dictate that an Article I court may not, consistent with the Constitution's separation of powers, be granted such jurisdiction. Data originators cannot assert their taking claims in the Claims Court, and there is no other forum available to them. The taking is therefore without just compensation.

CONCLUSION

The *amici* urge the Court to affirm the holding of the district court that the FIFRA use and disclosure provisions effect a taking of property for private use and without just compensation in violation of the Fifth Amendment.

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